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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 883

ATLANTIC COAST LINE RAILROAD COMPANY, BOSTON AND MAINE CORPORATION, and DES MOINES UNION RAILWAY COMPANY, *Petitioners,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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v.

BROTHERHOOD OF RAILROAD TRAINMEN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on September 6, 1967.

Opinions Below

The opinion of the District Court, set forth in Appendix A hereto, is reported at 262 F. Supp. 177. The opinion of the Court of Appeals, set forth in Appendix B hereto, is not yet officially reported but is unofficially reported at 56 CCH Labor Cases ¶ 12,160.

Jurisdiction

The judgment of the Court of Appeals, set forth in Appendix C hereto, was entered on September 6, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Where substantially identical proposals for changes in rates of pay, rules or working conditions are served at or about the same time under Section 6 of the Railway Labor Act (45 U.S.C. § 156) by or upon a multiple number of carriers, is the union required by the Act to bargain on a multi-employer basis with the joint representative designated by the group of carriers involved in the common dispute to represent them in negotiations with the union over the dispute?

2. Did respondent fail to comply with the mandate of the Railway Labor Act to exert every reasonable effort to make an agreement settling a dispute over proposed changes in crew-consist rules by refusing to bargain on a multi-employer basis with the joint representative designated by petitioners and other carriers involved in the common dispute to represent them in negotiations with respondent over the dispute?

Statutes Involved

Set forth in Appendix D hereto are Section 3 of Public Law 88-108 (77 Stat. 132) and the pertinent parts of the following provisions of the Railway Labor Act (44 Stat. 577, as amended, 45 U.S.C. § 151 *et seq.*): Sections 1 Sixth, 2, 2 First, 2 Second, 2 Third, 2 Ninth, 5 First, 6 and 10.

Statement of the Case

Section 6 of the Railway Labor Act (45 U.S.C. § 156) requires that written notice be given of proposed changes in "agreements affecting rates of pay, rules, or working conditions." The Act established a procedure for resolving such "major" disputes, including conferences on the property of the carrier or carriers involved (45 U.S.C. § 156),

mediation by the National Mediation Board (45 U.S.C. §§ 155, 156), a proffer of arbitration (45 U.S.C. §§ 155, 157, 158), and the possible appointment of an emergency board to investigate the dispute and make recommendations for its settlement (45 U.S.C. § 160). See, generally, *Elgin J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 722-728 (1945). None of the parties to such a major dispute may strike or engage in other unilateral self help to bring about a change in the existing rates of pay, rules or working conditions until it has exhausted the procedures established by the Act both in form and in substance.[1]

The above-stated propositions were not disputed in the court below and we do not believe that they will be disputed here. There also is no dispute about the fact that the respondent union has formally exhausted the procedures established by the Railway Labor Act with respect to Section 6 notices served upon petitioners, subject to the possible appointment by the President of an emergency board. The litigation turns upon the question of whether or not respondent has exhausted those procedures in substance by engaging in the kind of bargaining required by the Railway Labor Act and, more particularly, upon whether or not respondent is required by that Act to bargain on a multi-employer basis under the circumstances involved. Multi-employer bargaining, in which a union bargains on a concerted basis with the joint representative of a group of employers, commonly is referred to in the railroad industry as "national handling" and will be so referred to from time-to-time in this petition. The circumstances relevant to the issue are summarized below.

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[1] See, *e.g.*, *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966); *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284, 291 (1963); *Elgin, J. & E. R. Co.* v. *Burley*, *supra* at 722-728; *Long Island Rail Road Co.* v. *Brotherhood of Rail. Train.*, 183 F. Supp. 356, 358 (E.D. N.Y., 1960); *American Airlines, Inc.* v. *Air Line Pilots Ass'n. Inter.*, 169 F. Supp. 777, 793-798 (S.D. N.Y., 1958).

1. *Public Law 88-108 and the Award by Arbitration Board No. 282.* This dispute traces back to November 2, 1959, when most of the nation's railroads served respondent and four other unions with Section 6 notices of proposals to change various obsolete work rules, including a proposal to grant management the "unrestricted right" to determine the consist of train crews in road and yard service. Counterproposals were served by the unions on September 7, 1960, including a proposal to require at least one conductor and two brakemen or helpers on all road and yard crews. JA 4-5, 17-18, 36. Following the initial conferences upon the individual properties, all bargaining was engaged in on a multi-employer basis through national handling in accordance with the established practice with respect to such national wage and rule movements, including mediation by the National Mediation Board, an investigation by the Presidential Railroad Commission [2] and an investigation by an emergency board (JA 5-6, 36-37). On this aspect of the dispute, the Commission recommended (JA 306-308) that the parties enter into a national agreement establishing a uniform procedure whereby changes in crew-consist rules could be proposed by a carrier or union and, if no agreement was reached, the matter could be decided by a national "tribunal" pursuant to "criteria" specified in the agreement. Similar recommendations were made by Emergency Board No. 154 (JA 296-297). Although accepted by the carriers, those recommendations were rejected by the unions and the procedures of the Railway Labor Act were exhausted without a settlement of the dispute. In order to prevent a threatened nationwide railroad strike, P.L. 88-108 (77 Stat. 132) was enacted. That statute provided for arbitration of the crew-consist issue and another

[2] The Presidential Railroad Commission investigated the dispute on an *ad hoc* basis pursuant to an agreement of the parties, and is not a normal adjunct of the Railway Labor Act's procedures.

issue involving the use of firemen by an arbitration board (commonly known as Arbitration Board No. 282) comprised of two members designated by the carriers, two members designated by the unions and three neutral members designated by the President.

After noting that train crew consists currently were governed by local rules and had never been the subject of a national rule, Board 282 found that this "myriad of local arrangements has led to numerous inconsistencies in the manning of crews" that "some of the existing rules, originating as they did more than a half-century ago, are anachronistic and do not reflect the present state of railroad technology and operating conditions," and that there was evidence of "overmanning" under those rules and less persuasive evidence of "undermanning" on some assignments. *Opinion of Neutral Members*, 41 Labor Arbitration 680, 693-694 (1963). The basic problem before the Board was how best to remedy this deplorable situation. Board 282 rejected the proposal by the unions for a uniform national rule requiring at least two brakemen or helpers on each crew. The Neutral Members concluded that such a "national prescription of crew size would be wholly unrealistic" because the "consist of crews necessary to assure adequate safety and to prevent undue workloads must be determined primarily by local conditions," which varied widely. *Id.*, at 694. Thus, the unions' proposal was "unsatisfactory" in that it "fails to give consideration to local conditions," as well as because "it provides no method for correction of overmanning . . ." *Id.*, at 694-695. While the carriers' proposal for a national rule giving management discretion to determine crew consists "would certainly permit local determination and consideration of the many factors affecting the adequacy of crew size," the Neutral Members also rejected that proposal

because of their belief that the "employees involved . . . are entitled to more protection than is provided by [the carriers'] assurances of good faith" and their doubts as to whether "a ruling favoring the [proposal of] the carriers would constitute adequate compliance with the statute creating this Board." *Id.*, at 694.

Section 3 of P.L. 88-108 required Board 282 to "give due consideration to those matters upon which the parties were in tentative agreement." The parties had reached a large measure of tentative agreements upon a national agreement establishing procedures for resolving disputes over proposed changes in crew consist pursuant to national guidelines or criteria to be specified in the agreement. Board 282 concluded that this approach, which had been recommended by the Presidential Railroad Commission and the emergency board, was the most desirable one, and its Award, "[e]xcept for minor modifications, . . . reflects each of these tentative agreements, both in matters of approach and in matters of substance." *Id.*, at 696. Accordingly, Article III of the Award (JA 342-348) established a uniform national procedure whereby a carrier or union could serve written notice of proposed changes in rules requiring the use of a stipulated number of trainmen, the parties were required to confer upon such proposals and attempt to reach agreement through the application of national guidelines specified in the Award, and, if no agreement was reached, the matter could be submitted by either party to a special board of adjustment for binding decision in accordance with those guidelines. No trainmen could be discharged pursuant to the Award, and trainmen in active service as of the effective date of the Award were to be retained until removed from employment by natural attrition. Pursuant to Article III, respondent entered into some 95 agreements with various carriers and some 96 awards were rendered by special boards of adjustment.

Most of those agreements (including one entered into with petitioner Des Moines Union R. Co.) and awards (including awards obtained by the other two petitioners) permitted the use of less than two brakemen or helpers on some or all of the crews involved. JA 7-8, 37-38, 327-329.

2. *Service of the 1965 Section 6 notices and related events.* Under the direction of its President, Mr. Charles Luna, who considered Award 282 to be "obnoxious" (JA 244), respondent embarked upon a campaign to eliminate all of the changes in crew-consist rules brought about pursuant to the Award. One aspect of that campaign, which has been the subject of other litigation in the courts below, was to press a legal contention that the rules and agreements in effect prior to the Award automatically were restored when the Award expired on January 25, 1966.[3] Respondent also sought to persuade the carriers, in informal multi-carrier negotiations, to agree to a uniform crew-consist rule requiring at least a conductor and two brakemen or helpers on all road and yard crews (except where a smaller crew was permitted prior to the Award), in exchange for respondent's promise to cease its opposition to repeal of state "full crew" laws and its support of proposals to enact additional such laws.[4] And, respondent commenced the further proceedings under the Railway Labor Act which are the subject of this litigation.

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[3] Respondent's contention has been rejected by both the district court and the court of appeals, and the judgment of the court of appeals in that regard is the subject of a petition for writ of certiorari filed by the Brotherhood of Railroad Trainmen (and another union) now pending in this Court as No. 861. A cross petition for writ of certiorari filed by the carriers with respect to other aspects of that decision is now pending as No. 863.

[4] Some 33 carriers affected by a burdensome New York "full crew" law entered into such an agreement, but most of the carriers refused to do so (JA 168-171, 214-217, 236-237, 402-406). At the direction of Mr. Luna, the 1965 Section 6 notices were not served upon the carriers that entered into that agreement (JA 332).

On June 18, 1965, Mr. Luna instructed respondent's general chairmen (the principle local officers of the unions on the various railroads) to serve Section 6 notices on those carriers which either had obtained or were seeking reductions in crew consist pursuant to the Award (JA 332-337). Those notices, which were drafted by the Grand Lodge (respondent's national headquarters), proposed to establish a rule—effective the day after the expiration of Award 282—requiring the use of at least a conductor and two brakemen or helpers on all road and yard crews. Between June 18 and July 7, 1965, petitioners and more than 80 other carriers were served with such notices, and thus were faced with a demand that they adopt the identical uniform crew-consist rule which respondent had proposed in 1960 and which Board 282 had rejected. In December of 1965, those carriers and more than 20 others served respondent with notices of a counterproposal to the effect that management have discretion to determine the consist of train crews in road and yard service—which was identical to the proposal they had made in 1959. JA 9-10, 38, 53, 103-104, 213.

Petitioners and the other carriers notified respondent that they intended to designate a joint representative to bargain on their behalf in national handling of the dispute, if not settled in the initial conferences upon the properties, and requested respondent to participate in such national handling in accordance with the long-established practice (JA 11-12, 39-40). Apart from the 1965 Section 6 notices involved here, no one who testified at the trial (including Mr. Luna) could recall a single instance in which respondent had refused a request by the carriers for national handling, or in which the carriers had refused a request by respondent for national handling, when substantially identical Section 6 notices had been served at about the same time by or

upon a multiple number of carriers (JA 50, 77, 143, 242-244). The same practice also has been generally followed in negotiations between the carriers and other unions representing railroad employees (JA 4, 36, 387).[5] A report by respondent's Wage and Rules Committee to its 1954 national convention traced this practice of multi-employer bargaining back to 1902 (JA 406-414).

A wide variety of wage and rule proposals have been the subject of national handling. See, *e.g.*, JA 50-51, 73-75, 77-78, 80-81, 234-235, 387-390, 408-414. In addition to the national handling of the 1959-1960 Section 6 notices which culminated in Award 282, crew-consist proposals were handled nationally as a part of national wage and rules movements initiated in 1941, 1944, 1945, 1947 and 1956 (JA 51, 135-136, 242). While those proposals eventually were withdrawn as part of the national settlements of the overall disputes in most instances, Award 282 made a national disposition of the crew-consist proposals involved in the 1959-1960 notices and a 1964 national agreement established a crew-consist rule for self-propelled machines (JA 97, 129, 197-198).

Despite this long-established practice, despite the fact that it had participated in national handling of the identical proposals pursuant to the 1959-1960 Section 6 notices, and despite the fact that the dispute was not settled in the

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[5] On two occasions involving other unions, the carriers initially objected to national handling. With respect to a notice served by the Brotherhood of Maintenance of Way Employees, the carriers were persuaded by the National Mediation Board to participate in national handling and a national agreement was reached (JA 77-78, 115-116, 127). The other instance involved a proposal for a union-shop agreement served by 17 nonoperating unions. The NMB again sought to persuade the carriers to engage in national handling, an emergency board ruled that national handling was appropriate and the eastern carriers negotiated a concerted agreement which formed the pattern for separate agreements entered into by the other carriers (JA 78-79, 112-115, 121-122, 177-179). No union other than respondent has refused to participate in national handling (JA 50, 77, 143).

initial conferences upon the individual properties,[6] respondent refused to participate in national handling of the 1965 Section 6 notices as requested by the carriers (JA 12, 40). Respondent persisted in that refusal even though urged by the National Mediation Board to try to negotiate a national agreement.[7] And, respondent persisted in that refusal even though the carriers offered to retreat from their proposal that crew consists be left to managerial discretion and to attempt to negotiate a settlement which would be based upon the approach recommended by the Presidential Railroad Commission and by Emergency Board No. 154 and adopted by Arbitration Board 282 (JA 93-96, 310-323). In that connection, the carriers assured respondent that they would give serious consideration to any suggestions respondent might make for revision of the national guidelines and procedures established by

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[6] A dispute as to whether the Section 6 notices were premature and did not become effective so as to require conferences, etc., under the Railway Labor Act until after the expiration of the Award is one of the matters being litigated in the litigation referred to in fn. 3, p. 7, *supra*. The district court held that the notices were premature, the court of appeals held to the contrary, and the latter holding is one of those as to which review by this Court is being sought in the petition for writ of certiorari filed in No. 863. The issues in this case are not dependent upon the manner in which that dispute is resolved, however, as respondent did participate in conferences with petitioners and many of the other carriers after expiration of the Award (JA 11, 39, 323-327, 369-376).

[7] In a meeting with the Chairman of the NMB, Mr. Luna and Mr. J. E. Wolfe (then Chairman of the National Railway Labor Conference) agreed (without prejudice to their respective positions concerning national handling) to a series of "test negotiations" on six carriers. The negotiations were to be attended by national representatives of the parties, as well as by local representatives and a mediator appointed by the NMB. Upon conclusion of the "test negotiations," the Chairman of the NMB was to meet with Messrs. Wolfe and Luna at which time they would review what had taken place and attempt to work out a settlement of the entire dispute. JA 88-90, 168, 171-172, 191-194, 228-231. However, Mr. Luna subsequently refused to attend such a meeting (JA 90, 230-231). The Chairman of the NMB also had had an earlier meeting with Messrs. Wolfe and Luna to "see if he couldn't work the thing out between the national figures," and, as of the time of the trial, he was "still trying to do that" (JA 288-289).

Award 282, and that they would be willing to have the consists of all crews, including those established pursuant to the Award, reviewed under any revised procedures and guidelines that might be agreed upon.

Respondent's refusal to participate in national handling of the 1965 Section 6 notices was a deliberate tactical maneuver in its campaign to do away with all that was accomplished under Award 282, whereby respondent sought to put itself in a position to engage in "whipsaw" strikes against one or a few of the carriers at a time so as to force them to agree to the crew-consist rule proposed by respondent, without risking further congressional intervention, while the other carriers were still enmeshed in the procedures of the Railway Labor Act. On November 25, 1963, at about the time Award 282 was issued, Mr. Luna was reported (JA 308-310) to have stated that he was convinced "that the government will never permit a national rail strike," but "would not move to prohibit strikes against single railroads if the other roads were not struck." Hence, thereafter respondent would insist on bargaining with the individual railroads only and would refuse national handling, except with respect to wages, vacations and holidays. "What we are trying to do is stay out of the box we got into in the work rules dispute [arising out of the 1959 and 1960 Section 6 notices]. We want to keep in a position to use our economic strength" (JA 309-310). Mr. Luna testified at the trial that the report is accurate and stated the "policy" which he "adopted" and has "pursued ever since" (JA 246; see, also, JA 219, 233-234, 242-243). Thus, a resolution adopted by respondent's 1964 national convention, after referring to P.L. 88-108 which assertedly had prevented respondent "from exercising its economic rights," resolved that "the 1964 Convention . . . go on record opposing any further

Rules Changes being handled on a National basis. . . ." (JA 223, 415).

As Mr. Luna indicated in his November 25, 1963 statement, however, respondent has been unwilling to give up national handling of other issues in which that procedure was thought to be more favorable to respondent than individual handling (see JA 234-236, 387-388). Among other things, respondent has recently negotiated national agreements with the carriers with respect to health and welfare, accommodations away from home, supplemental annuities, wages and vacations (JA 73-75, 80-81, 223-225). As of the time of trial, the current crew-consist dispute had been the only exception to respondent's participation in national handling of national wage or rule movements.

Moreover, respondent has maintained "national" control over its activities with respect to the 1965 crew-consist notices, even though refusing to bargain on a national basis. Rather than let the general chairmen determine if and when a Section 6 notice should be served and the nature of the proposal to be made, as is respondent's practice in truly local disputes (JA 260-261, 386-387, 390), Mr. Luna (JA 331-341) provided the general chairmen with drafts of the notices to be served, informed them of respondent's policy in that regard, and instructed them that "this movement, although confined to each railroad property, is to be handled under the direction of the President. . . ." (JA 336). Thus, while respondent was refusing to negotiate with the carriers on a national basis, respondent controlled the negotiations by its representatives with the individual carriers in such a manner as to undermine any possibility of reaching local settlements which did not specify the crew-consist rule demanded by respondent's national officers. This is well illustrated by an incident which occurred in the course of the negotiations with petitioner Des Moines Union Railway Company. Respondent's

general chairman on that carrier had approved an agreement under Award 282 for a one-and-one consist on all crews and believed that the "one and one crew was here to stay." Moreover, he was faced with a campaign by a rival union to take over the right to represent trainmen on that carrier. The rival union was using as a selling point the fact that it had negotiated agreements with other carriers providing for increased compensation rather than increases in the size of crews, and many of the employees were "continually" urging him to make a similar proposal to the carrier. The general chairman requested permission from Mr. Luna to make such a proposal, but was instructed that it was against "Brotherhood Policy." Consequently, the general chairman did not make such a proposal, stood firm upon the demand for a one-and-two rule, and concluded that the dispute would have to be settled at the national level through national handling. JA 150-167, 327-330, 376-377, 416-417.

3. *The decisions below.* After respondent rejected (although the carriers accepted) a request by the National Mediation Board that the dispute be submitted to arbitration, the Board terminated its services with respect to petitioners on October 4, 1966 (JA 13, 41). Petitioners thereafter filed their complaint for a declaratory judgment and injunctive relief (JA 2-34),[8] and a trial upon the merits ensued. The findings of fact by the trial judge, as well as his conclusions of law, are set forth in the opinion appended hereto as Appendix A.

Upon the basis of the record developed at the trial, the trial judge found, among other things, that: "[f]or many years it has been the practice in the railroad industry to handle on a national basis the adjustment of labor disputes

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[8] The jurisdiction of the District Court was grounded upon 28 U.S.C. §§ 1331, 1337, 2201 and 2202.

that affect more than a single carrier" (App. A, at 12a); that "numerous topics" have "been treated in this manner" right up to the time of trial (*id.*, at 12a); that whenever "identical notices [are] served on a number of carriers, at about the same time, the subject matter is peculiarly fitting for what is called in the industry 'national handling' and becomes a 'national issue'" (*id.*, at 12a); that the National Mediation Board has encouraged national handling and discouraged "attempts to negotiate such matters individually with each railroad concerned" (*id.*, at 12a); that the present dispute is a "continuation of the dispute commenced by service of notices in 1959 and 1960," which "was conducted on a nation-wide basis" (*id.*, at 12a); that "the current stage of the dispute has been handled nationally on both sides, except that the Union declined to face the carriers as a group" (*id.*, at 13a); that respondent's "purpose in avoiding negotiations on a national basis in this instance" was to further Mr. Luna's "plan . . . to isolate every railroad and call separate strikes, one at a time, in order to obtain his ultimate objective, step by step" (*id.*, at 13a-14a); that respondent continues to engage in national handling of other subjects (*id.*, at 14a); and that respondent's argument "that the size of the crews is particularly a local matter . . . is contradicted . . . by the very actions of the Union" (*id.*, at 14a).

The District Court concluded, among other things, that "the Railway Labor Act by its express provisions authorizes carriers to act jointly as a group in negotiating matters initiated by notices under Section 6" (*id.*, at 14a), which "consideration is alone sufficient to sustain the position of the carriers" (*id.*, at 15a); and that respondent's refusal to bargain on a multi-employer basis also is contrary to the obligation imposed by the Railway Labor Act "to negotiate in a genuine manner" (*id.*, at 18a)—*i.e.*, in "good faith"—as is shown by decisions under the Labor

Management Relations Act which imposes a similar obligation on employers and unions subject to that Act (*id.*, at 15a-18a). Consequently, the District Court entered a judgment declaring the right of the carriers to national handling of the dispute created by the 1965 Section 6 notices and enjoining respondent from striking petitioners unless and until respondent participates in such national handling and otherwise exhausts the procedures of the Railway Labor Act (JA 448-450).

The Court of Appeals reversed. While that court did not accept respondent's contention that national handling can never be required and is entirely dependent upon mutual agreement of the parties, it also rejected the trial court's interpretation of the Railway Labor Act and petitioners' contentions in that regard (App. B, at 23a). The Court of Appeals referred to petitioners' contention (see pp. 29-30, *infra*) that carriers involved in a common dispute have a right, under Sections 1 Sixth and 2 Second of the Act, to designate a joint bargaining representative and to bargain on a multi-carrier basis (App. B, at 23a), and to the trial court's approval of that contention (*id.*, at 24a), but did not explain the reasons for its rejection of that contention.

With respect to petitioners' alternate contention (see pp. 30-34, *infra*), also approved by the trial court, that respondent's refusal to participate in national handling of the current dispute violated the requirements in Section 2 First of the Act that it "exert every reasonable effort" to make an agreement disposing of the dispute—*i.e.*, that it bargain in "good faith"—the Court of Appeals stated (App. B, at 25a-26a) that:

> "What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does

not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. Whether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements. The history and realities of crew consist bargaining in this industry impel the conclusion that mass handling was not required by the statute for bargaining on that issue."

The "history and realities of crew consist bargaining" relied upon by the Court of Appeals in reaching that conclusion were the rejection by the Presidential Railroad Commission and Arbitration Board No. 282 of the very uniform one-and-two crew consist rule which petitioner is now demanding because such a "national prescription of crew size would be wholly unrealistic" (App. B, at 25a). The Court of Appeals ignored the fact that the Commission and Board did not consider a national crew-consist agreement establishing procedures and guidelines for determining crew consists to be unrealistic, and that such an agreement had been recommended by the Commission and such national procedures and guidelines adopted by Board 282; the Court of Appeals ignored the fact that the carriers had urged that this very dispute be settled upon the basis of such an approach and had never urged or proposed a "national prescription of crew size;" and the Court of Appeals disregarded the fact that in the past the parties consistently had bargained on a multi-employer basis whenever substantially similar proposals were served at about the same time by or upon a number of carriers, since such uniform demands in itself sufficed to establish that a national, rather than a local, dispute was involved.

4. *The effects of strikes by respondent.* If the decision below is not reviewed by this Court the injunction entered by the trial court will be vacated and respondent no longer will be restrained from striking petitioners over its demand for a one-and-two crew consist rule. In addition, the National Mediation Board has terminated its services with respect to 16 other carriers, who filed a companion case in the District Court. *Chesapeake & Ohio Railway Company, et al.* v. *Brotherhood of Railroad Trainmen,* Civil Action No. 3180-66. By agreement of the parties, the record in this case was made part of the record in that case and the District Court entered a preliminary injunction, on February 13, 1967, similar (except for its preliminary nature) to the judgment entered in this case upon the basis of the opinion, findings and judgment in this case.[9] Further proceedings in the *Chesapeake & Ohio* case have been stayed pending disposition of this case, but immediate strikes of the 16 carriers involved therein also could occur if the decision by the Court of Appeals in this case is not reviewed by this Court.

The effect of a strike of petitioner Atlantic Coast Line Railroad Company upon that carrier and upon the public was outlined in an affidavit filed with the court below.[10] It is there stated that Atlantic Coast Line, which then operated over 5700 miles of track in six southeastern states, would lose gross operating revenues in the amount of about $600,000 per day, that

[9] Shortly after filing the complaint in this case, petitioners obtained a temporary restraining order against strikes by respondent. At the suggestion of the trial court, the parties agreed to bypass the preliminary injunction stage in this case and go directly to trial, and respondent agreed not to strike either petitioners or the plaintiffs in the *Chesapeake & Ohio* case pending entry of the court's judgment after that trial. The Court of Appeals stayed its mandate pending action by this Court upon this petition and, if granted, upon the merits, so that the injunctive relief granted by the trial court currently remains in effect.

[10] Affidavit of L. T. Andrews, filed January 30, 1967.

many passengers and shippers are dependent upon the carrier for rail service, and that a number of military installations are dependent upon the carrier for rail service including the Military Ocean Terminal at Sunny Point, Leland, North Carolina, from which a large volume of ammunition is shipped to the United States forces in Viet Nam. Since that affidavit was filed, the Atlantic Coast Line has merged with the Seaboard Air Line Railroad Company to form the Seaboard Coast Line Railroad Company. In approving the merger, the Interstate Commerce Commission found that the merged railroad would operate 12,390 miles of track in the six-state area, constituting more than 54% of the total railroad mileage in that area, and that the Southern Railway System—which also may be subject to a strike by respondent—operates about 34% of the total railroad mileage in that area.[11] A similar affidavit,[12] filed with respect to petitioner Boston and Maine Corporation, demonstrates that a strike of that carrier would disrupt commuter service for some 12,000 passengers daily in the Boston area, would disrupt freight service in Massachusetts, New Hampshire, and parts of Maine, Vermont and New York, and would deprive the carrier of daily freight revenues in the amount of approximately $140,000.

The 16 carriers involved in the companion *Chesapeake & Ohio* case include the Chesapeake & Ohio Railway Company, the Gulf, Mobile & Ohio Railroad Company, the Missouri Pacific Lines (five affiliated carriers), the Southern Railway System (eight affiliated carriers), and the Union Pacific Railroad Company. Affidavits filed with the Dis-

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[11] *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 163 (1963), upheld, *Florida East Coast Railway Company* v. *United States*, 259 F. Supp. 993 (M.D. Fla., 1966), aff'd *per curiam*, 386 U.S. 544 (1967), prior opinion, 242 F. Supp. 14 (M.D. Fla., 1965), rev'd, 382 U.S. 154 (1965).

[12] Affidavit by William J. Ahearne, filed January 30, 1967.

trict Court in that case disclose that the railroad systems involved therein are among the largest in the United States, and that strikes of those railroads would have disastrous consequences to the railroads and to the public. Among other things, it was estimated that the loss of operating revenues would approximate $1,100,000 per day for the Chesapeake & Ohio, $250,000 per day for the Gulf, Mobile & Ohio, $1,000,000 per day for the Missouri Pacific Lines, several hundred thousand dollars per day for the Southern Railway System, and $1,600,000 per day for the Union Pacific. Many commuters and other passengers, shippers and military installations would be deprived of rail service.[13]

Moreover, there are some eighty odd other carriers which were served with respondent's 1965 Section 6 notice or which served respondent with the carriers' counterproposal. While the National Mediation Board has not yet terminated its services with respect to those carriers, they may be in a position to resort to self help so as to preserve a common front in the common dispute, in which event the strike almost certainly would become nationwide in extent. See p. 33, fn. 24, *infra*. But even if that cannot be done until after the Mediation Board terminates its services, the nation will be facing the prospect of a series of strikes as such terminations occur if the decision below is left standing.

Reasons for Granting the Writ

This case is important in its own right both to the parties and to the public. The decision below could result in disastrous railroad strikes designed to coerce the railroads into accepting rules for the manning of train crews which

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[13] See the affidavits (filed January 23, 1967) of James E. Wolfe; George M. Seaton, Jr. (¶34); Thomas P. Gleason (¶27); Maynard E. Parks (¶33); L. G. Tolleson (¶28); and Glen L. Farr (¶32).

have been condemned by every impartial agency that has considered the matter despite the fact that no bargaining has yet occurred in an effort to reach an overall national settlement such as one which would build upon the foundation provided by the Award of Arbitration Board No. 282. But the importance of this case transcends the situation immediately involved. The issues as to whether and in what circumstances multi-employer bargaining may be required under the Railway Labor Act go to the very heart of collective bargaining in the railroad industry.[14] The decision below would leave the established practice of many years standing without a firm statutory basis and, we believe, would unsettle labor relations in the industry for years to come. While the decision below does recognize that national handling may be required in some circumstances, it is clearly wrong in rejecting the basic criterion of similar demands served by or upon a multiple number of carriers at approximately the same time.[15]

A. *This Case Involves Important Issues of Federal Law Which Have Not Been, But Should Be, Settled by this Court.*

Bargaining between the union and the individual carriers has failed to resolve the dispute created by the 1965 Section 6 notices. Subject to the possible appointment by the Presi-

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[14] And also in the airline industry which is subject to the pertinent provisions of the Railway Labor Act by reason of 49 Stat. 1189, 45 U.S.C. § 181.

[15] The court below stated (App. B, at 23a) that its "more individuated approach" is "akin to that suggested in the brief of the United States appearing as *amicus curiae* . . . ." In that brief, however, the United States urged—as did respondent—that multi-carrier bargaining is dependent upon the consent of all parties thereto. While we disagree with that contention, we note that the unusual action of the Solicitor General in authorizing the filing of an amicus brief (at the instigation of the Department of Labor, as we understand) in this case while before the Court of Appeals reinforces our view as to the importance of the issues involved.

dent of an emergency board under Section 10 of the Railway Labor Act (45 U.S.C. § 160), therefore, serious railroad strikes may be expected to ensue if the decision below is left standing. We have summarized some of the effects of such strikes at pp. 17-19, *supra,* but the matter really is self evident. The nation's transportation system will be drastically crippled, depriving important military installations and defense industries of essential rail transport to the detriment of our military effort in Viet Nam and our defense posture generally, and many other shippers and passengers will be similarly deprived. Each day that such strikes continue, the railroads will be deprived of many millions of dollars in revenue and their employees—most of whom are not members of respondent—will be deprived of wages.

While the immediate detrimental effects of such strikes to the carriers and the public are relatively obvious, their long-term detrimental effects—if successful—may not be as readily comprehended but also will be of great importance. The carriers will be coerced into adopting a crew-consist rule which was rejected by the Presidential Railroad Commission, by Emergency Board No. 154, by Arbitration Board No. 282, and by many special boards of adjustment established under Award 282, because it does not reflect actual manpower needs in the light of safety, work load and other relevant considerations, and will result in the use of many unnecessary employees. This can only lead to increased costs to railroads who already are financially hard pressed and thus to higher rates to the public.

We cannot assure the Court, of course, that multi-carrier negotiations will result in an agreement settling the dispute without resort to disastrous strikes. The Railway Labor Act does not compel agreement in multi-carrier bargaining just as it does not do so in individual bargaining.

Rather, the Act establishes procedures that "are purposefully long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966). But, as we have noted, bargaining between the union and the individual railroads has failed, and multi-carrier bargaining may succeed in peacefully resolving the dispute if given a fair opportunity. The carriers and the public should not be deprived of that opportunity if it is afforded by the Railway Labor Act, as we believe.

As the National Mediation Board has observed, "[p]ast history has indicated that the procedure of handling wage and rule movements by concerted action generally results in agreement between the labor organization and carriers without resorting to the use of economic force." Twenty-Sixth Annual Report (1960), at 9. Efforts to reach a compromise in multi-carrier bargaining are not hampered by the fears of a particular carrier that it may obtain less favorable terms than a competitor or of a particular union representative that he may not do as well as the union representative on some other carrier, and the limited number of mediators assisting the Mediation Board can be more effectively employed. See JA 81-85, 225, 234-236. The "pressures" of public opinion, which the Congress contemplated would play a prominent role in persuading the parties peacefully to settle labor disputes under the Railway Labor Act,[16] can be more effectively brought to bear in national negotiations. See Lecht, *Experience under Railway Labor Legislation* (1955 ed.), at 168. This is well illustrated by the belief of respondent's president that the Congress, if national negotiations did not result in a peaceful settlement, would intervene by enacting special legis-

[16] See *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 725 (1945).

lation, such as P.L. 88-108. That consideration, which affects the carriers as well as the unions, obviously could be a potent "practical consideration" in favor of the compromises necessary to reach a voluntary agreement so as to avoid the uncertainties attendant upon congressional action.

Furthermore, it seems apparent that the chances of reaching a peaceful settlement will at least be enhanced if consideration is given to the possibility of building upon the existing framework. In the crew-consist area, that existing framework is provided by Award 282 which is national in scope. The approach adopted in Award 282, whereby national procedures and guidelines are established for application on the local properties, not only was approved by the Neutral Members of Board 282, but was recommended by the Presidential Railroad Commission and Emergency Board No. 154. The carriers have assured respondent in writing that they are willing to consider any modifications in those procedures and guidelines that respondent may propose, and to attempt to work out a new national agreement which will reflect any modification that the parties deem to be desirable in the light of their experience under Award 282 and other relevant considerations. If national negotiations are had, this approach can at least be fully explored and we believe that it offers the best hope for a peaceful settlement.[17]

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[17] To be sure, the parties were unable to reach an agreement embodying such an approach in the negotiations over the 1959-1960 Section 6 notices. But they also were unable to agree upon any other approach, including the uniform one-and-two rule proposed then and now by respondent, and they came close to agreeing upon such national guidelines and procedures. Indeed, the crew-consist provisions of Award 282 for the most part are based upon matters tentatively agreed upon by the parties in their negotiations. See, p. 6, *supra*. Moreover, those negotiations were complicated by the fact that many other issues were involved, while the 1965 Section 6 notices are limited to the crew-consist issue. The NMB recently observed that the "experience in [national] handling has been generally satisfactory

This Court granted certiorari at the instance of the unions (including the respondent here) to review a decision that the Section 6 notices served by the carriers in 1959, including a proposal similar to that made in the carriers' 1965 Section 6 notices, were valid and that the procedures of the Railway Labor Act had been exhausted with respect to such notices so as to permit a resort to self help, subject to the possible appointment of an emergency board. *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963). We submit that the justification for a grant of this petition, even if considered only in terms of the situation immediately involved, is more substantial in view of the circumstances discussed above.

The importance of this case, moreover, is not limited to the crew-consist dispute which is immediately involved. It is difficult to conceive of an issue more important to the administration of the Railway Labor Act than whether, and the circumstances in which, multi-employer bargaining may be required under that Act. The statutory foundations for what heretofore has been the established procedure for resolving national wage and rule movements, such as that initiated by respondent with its 1965 Section 6 notices, are drawn into question. The importance of that procedure to the success of collective bargaining in the railroad industry has been affirmed on numerous occasions.[18]

Thus, in its Third Annual Report (1937), the National Mediation Board stated, at p. 3, that:

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when the requests are relatively uniform as to wages or involve only a few rules proposals," while notices involving "numerous proposals for changes in rules" are more difficult to settle. Thirty-Second Annual Report (1966), at 10.

[18] It also has been recognized that multi-employer bargaining contributes to the stability of labor relations and is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining" in other industries. *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87, 95 (1957).

> "The faculty of the railroads collectively and the representatives of their employees to hold joint conferences and enter into understandings constructively disposing of problems affecting the industry and its employees as a whole is indicative of the steady basic improvement which has been taking place in recent years in the attitude of railroad managements and railroad labor organizations toward one another. The consummation of such nation-wide understandings is, in the opinion of the National Mediation Board, deserving of all possible encouragement and commendation. Insofar as other problems may arise common to all the railroads, regionally or nationally, and their employees, it is the hope of the Board that they may likewise be considered in joint conference and disposed of through understandings regional or nation-wide in scope."

And see, *e.g.*, Thirty-Second Annual Report (1966), at 10; Twenty-Sixth Annual Report (1960), at 9. Consistent with this attitude, the NMB sought to persuade respondent to participate in national handling of the current crew-consist dispute.[19] See p. 10, *supra*.

In the so-called Union Shop Case, counsel for 17 unions representing the carriers' nonoperating employees pointed to the fact that "every national movement, whether for wages or rules changes, has been handled and finally disposed of on a national basis" since 1931, and urged that:

> "As a result of the foregoing pattern consistently

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[19] The NMB has no enforcement powers as such, and can only attempt to persuade the parties to comply with the bargaining requirements of the Railway Labor Act. See Fifteenth Annual Report (1949), at 2. If a party refuses to do so and mediation fails "to bring about an amicable settlement," the Board's only recourse is to make a proffer of arbitration and terminate its services. 45 U.S.C. § 155 First.

followed in every national movement for twenty years, national handling has become firmly established as a part of the necessary procedure for the handling of national movements. It has uniformly been recognized by both sides as essential if collective bargaining of a uniform national proposal is to function, else the bargaining process cannot hope to dispose of such an issue in anything like an orderly fashion. The refusal to bargain concertedly in such a situation thus amounts simply to a refusal to have the only type of collective bargaining that can effectively dispose of the issues. . . ."

Brief for the Seventeen Cooperating Railway Labor Organizations, at 79. Emergency Board No. 98, to which that brief was addressed, agreed. See p. 35, *infra*.

Many unions continue to agree with that view. One of the most widely known railway union leaders is Mr. George E. Leighty. As he testified this year before a congressional committee, he is chairman of the Railway Labor Executives' Association, president of the Transportation-Communications Employees Union, chairman "of the national negotiating committee of the cooperating nonoperating railway unions," has about 50 years experience in the railroad industry, and knows "this industry as well as any man, not only from the standpoint of its labor relations, but from the standpoint of its operating practices." Hearings on H.J. Res. 559 before the House Committee on Interstate and Foreign Commerce, 90th Cong., 1st Sess., at 217. In his testimony, Mr. Leighty noted that respondent and one other union "have begun to move away from national handling," although of the "42 national movements for improvements initiated by the five operating organizations and the 11 principal nonoperating organizations" in the last 15 years "39 were settled without a strike and without

the kind of 'crisis' that bring Congress into the picture" (*id.*, at 227-228). In response to an inquiry as to whether it is practical for the unions and management in the railroad industry "to negotiate on other than a nationwide basis," Mr. Leighty testified (*id.*, at 256):

> "I do not consider it practical. You would have to handle 200 to 300 separate negotiations in the railroad industry on each movement. I don't believe it would work out."

In Mr. Leighty's informed view, "insofar as national negotiations are concerned, as they have worked out in the past, it has been advantageous to both of us. I think it has helped us materially; it has helped the carriers materially. It has prevented, in my opinion, a great deal of chaos." *Id.*, at 257.

As long as national handling of national wage and rule movements was generally accepted either through a belief as to its desirability or through a belief that it could be required under the Railway Labor Act, issues as to the statutory basis of that practice were seldom raised despite their importance. But, as this case demonstrates and as Mr. Leighty testified, respondent has "begun to move away from national handling." If respondent is successful in doing so, as it will be if the decision below stands, other unions will feel the pressure to do likewise. Whatever may be the views of their leaders as to the desirability of national handling in general, there are bound to be specific situations in which it is thought that a refusal of national handling will result in overriding tactical advantages. Nor will the carriers be immune from this pressure. There will be national movements, like the Union Shop Case, in which the tactical advantages of refusing national handling will be on their side. There is grave danger that the broad view

that multi-carrier bargaining in the long run benefits both management and labor, as well as the public, will be lost sight of because of the urge to seize an immediate advantage.

We think it clear that multi-employer bargaining is beneficial to harmonious labor relations and thus serves one of the fundamental purposes of the Railway Labor Act. As the National Mediation Board commented in its Third Annual Report, the ability of the railroads and the representatives of their employees "to hold joint conferences and enter into understandings constructively disposing of problems affecting the industry and its employees as a whole is indicative of the steady basic improvement" in their relations with one another. Exclusively local bargaining upon issues of general concern may adversely affect the employees because of the much greater time required to negotiate the same issue to a conclusion on many railroads, as compared with one national negotiation, and because local negotiations may result in different treatment of employees similarly situated. And, from the carriers' point of view, there can be no justification for relegating the negotiation of common problems exclusively to local handling whenever the unions so insist, particularly in view of the uniform rate regulation to which the industry is subject and the competitive importance of holding costs to a relatively common level. Yet, the decision below would permit just that insofar as this important area of manning train crews is concerned.

In view of the above considerations, we submit that this case raises issues of large importance to collective bargaining under the Railway Labor Act which should be settled by this Court at this time.

B. *The Decision Below Is Erroneous.*

This is not a case in which the decision below is so plainly correct that the Court might appropriately decline to review that decision despite the importance of the issues involved. That proposition hardly needs to be demonstrated since the court below did not cite any authority for its rejection of petitioners' contention that multi-employer bargaining is required when the same proposals are served at the same time by or upon a multiple number of carriers, the trial court reached a contrary result, and respondent's interpretation of the Railway Labor Act also was rejected by the court below. For present purposes, therefore, it seems sufficient to state very summarily the reasons for our view that the decision below is erroneous.

1. Section 1 Sixth of the Act defines "representative" as used therein to mean "any person or persons, labor union, organization, or corporation designated either by a carrier or *group of carriers* or by its or their employees to act for it or them." 45 U.S.C. § 151 Sixth (emphasis added). Section 2 Second provides that all "disputes between a carrier or *carriers* and its or their employees shall be considered, and, if possible, decided, with all expedition, in conferences between representatives designated and authorized so to confer, respectively, by the carrier or *carriers* and by the employees thereof interested in the dispute." 45 U.S.C. §152 Second (emphasis added). On its face, this language plainly authorizes a "group of carriers" to designate a joint representative to bargain with the interested union as representative of the entire group; *i.e.*, in multi-employer bargaining or national handling.

While the court below acknowledged petitioners' argument based upon that express statutory language (which has no counterpart in the Labor-Management Relations Act), no explanation was given for its rejection of the argu-

ment. Respondent conceded that, under Sections 1 Sixth and 2 Second, the carriers have an absolute right to designate a joint representative to bargain on their behalf, but contended that the union is not required to bargain with the joint representative as the representative of the group and may insist that he bargain on behalf of only one carrier at a time.[20] That interpretation would drain the statutory provisions of all meaningful content. The designated representative would not be the representative of a "group of carriers," but merely a person who happens to represent several carriers. There could be no "disputes between . . . carriers and . . . their employees" which "shall be considered, and, if possible, decided, with all expedition, in conferences between representatives designated and authorized so to confer, respectively, by the . . . carriers and by the employees thereof interested in the dispute," but only "disputes between a carrier . . . and its . . . employees," etc.

2. Section 2 First of the Act provides that it "shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain

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[20] Respondent urged that its interpretation is supported by the fact that certifications of a union as the authorized collective bargaining agent, under Section 2 Ninth (45 U.S.C. § 152 Ninth), are on a single carrier rather than a multi-carrier basis. Under the logic of that argument, multi-employer bargaining would not be permissible in any circumstances. Yet, respondent concedes that multi-employer bargaining is proper when both the carriers and union consent thereto, and it could hardly do less in view of the long history of such bargaining. And, the court below plainly did not accept this argument by respondent as it held that multi-employer bargaining may be required in some circumstances. We note that most railway labor unions are "national in scope" in that they represent a class or craft of employees on many carriers rather than on one or a few carriers. *California* v. *Taylor*, 353 U.S. 553, 567 (1967). Moreover, it is the national union, rather than a local lodge, which is the authorized representative. *Childers* v. *Brotherhood of R. Trainmen, Etc.*, 192 F. 2d 956 (8th Cir., 1951). Hence, there is nothing inconsistent in certifying unions on a carrier-by-carrier basis and providing at the same time for bargaining by that union with the joint representative of a "group of carriers."

agreements concerning rates of pay, rules, and working conditions . . . , in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152 First. This provision has been construed to impose a duty to bargain in "good faith" similar to that imposed by the Labor-Management Relations Act,[21] although it has been suggested that "the Railway Labor Act imposes a somewhat greater duty to endeavor to reach agreement. . . ." *Chicago, Rock Island & Pacific R. Co.* v. *Switchmen's Union*, 292 F. 2d 61, 70 (2d Cir., 1961).

We do not see how anyone can rationally contend that this duty to exert *every* reasonable effort to make and maintain agreements, so as to avoid the interruption of rail transportation by strikes, did not oblige respondent at least to *negotiate* with the carriers on a national basis and *try* to work out a national agreement disposing of the dispute. The parties and the courts were not faced with an either/or choice between local and national handling. Under the established practice, when uniform Section 6 notices are served by or upon a number of carriers, the initial conferences are held upon the individual properties and national handling occurs only if those local negotiations fail. That is all that the carriers requested with respect to the 1965 crew-consist notices. The local negotiations did fail to settle that dispute. While the parties would not be required to reach agreement in such multi-employer bargaining, as we have shown (pp. 21-23,

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[21] See, *e.g.*, *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 721-722, fn. 12 (1945); *Norfolk & P.B.L. R. Co.* v. *Brotherhood of Rail. Train.*, 248 F. 2d 34, 45, fn. 6 (4th Cir., 1957); *Brotherhood, Etc.* v. *Atlantic Coast Line R. Co.*, 201 F. 2d 36, 39 (4th Cir., 1953); *Long Island Rail Road Co.* v. *Brotherhood of Rail. Train.*, 185 F. Supp. 356, 358 (E.D. N.Y., 1960).

supra) the possibility that an agreement would be reached cannot be rejected out of hand.

The carriers' position in this regard is supported by analogy to decisions under the Labor-Management Relations Act. Unlike the Railway Labor Act (if we are correct in our interpretation of Sections 1 Sixth and 2 Second, pp. 29-30, *supra*), that Act does not expressly provide for multi-employer bargaining, but it does require the employers and unions to bargain in "good faith" (29 U.S.C. § 158). Both the NLRB and the courts have held that where a practice or history of multi-employer bargaining has been established, neither an employer or union may withdraw therefrom (without consent of the other side) except in a timely and unequivocal manner; otherwise, an employer or union is guilty of an unfair labor practice for refusing to bargain in "good faith" if it attempts to bargain separately or to engage in "whipsaw" strikes against one or a few members of the multi-employer group.[22] In addition, if one or a few members of such a multi-employer group are subjected to "whipsaw" strikes, the other members may lockout their employees and operate with temporary replacements, and may otherwise engage in such self help as may be necessary "to preserve the multiemployer bargaining unit from the disintegration threatened by the whipsaw strike."[23] The facts and circumstances in the railroad industry permit application of these same principles.

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[22] *E.g., Detroit Newspaper Publishers Association* v. *N.L.R.B.*, 372 F. 2 569 (6th Cir., 1967), enforcing *Evening News Association*, 154 N.L.R.B. 1494 (1965); *Publishers' Association of New York City* v. *N.L.R.B.*, 364 F.2d 293 (2d Cir., 1966); *Universal Insulation Corp.* v. *N.L.R.B.*, 361 F. 2d 406 (6th Cir., 1966); *N.L.R.B.* v. *Sheridan Creations, Inc.*, 357 F. 2d 245 (2d Cir., 1966); *Int'l Union of Operating Engineers, Local 825*, 145 N.L.R.B. 952 (1964); *Westchester County Executive Committee, Etc.*, 142 N.L.R.B. 126 (1963).

[23] *Labor Board* v. *Brown*, 380 U.S. 278, 282 (1965); *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87 (1957); *N.L.R.B.* v. *Great Falls Employers' Council*, 277 F. 2d 772 (9th Cir., 1960).

For more than 30 years prior to the instant dispute, the carriers and respondent bargained on a multi-employer basis whenever substantially identical Section 6 notices were served at about the same time by or upon a number of carriers. We doubt if the duty to exert "every reasonable effort" to reach agreement would permit even a timely and unequivocal withdrawal in view of that long-established practice, but certainly no less should be required.[24] Under the cases arising under the LMRA, a withdrawal is untimely if negotiations for a new contract have commenced. See the cases cited in fn. 22, *supra*. And, an "attempted withdrawal cannot be accepted as unequivocal and in good faith where, as here, it is obviously employed only as a measure of momentary expedience, or strategy in bargaining." *Retail Associates, Inc.*, 120 N.L.R.B. 388, 394 (1958); see *N.L.R.B.* v. *Jeffries Banknote Company*, 281 F.2d 893, 896 (9th Cir., 1960); *Pacific Coast Association*, 163 N.L.R.B. No. 129 (1967); *Jahn-Tyler Printing & Pub.*

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[24] The NLRB has long held that an employer could withdraw from multi-employer bargaining if it did so in a timely and unequivocal manner, but first permitted such withdrawals by a union in *Evening News Association*, 154 N.L.R.B. 1494 (1965), over a vigorous dissent. In enforcing that decision because of the discretion conferred upon the Labor Board in such matters, the Sixth Circuit expressed concern because the right to withdraw was not more restricted since "in our judgment Board policies should be framed substantively to bolster the multi-employer unit as an instrument of national policy." *Detroit Newspaper Publishers' Association* v. *N.L.R.B.*, *supra* at 572. That court also expressed the view that the employers could continue to protect their common interests through lockouts, despite the union's withdrawal. *Ibid.* Most commentators have criticized the *Evening News* decision on substantially the same basis, and consider the right to defend against whipsaw strikes by lockouts in such circumstances to be essential. Note, 53 Va. L.R. 1189 (1967); Note, 1967 Duke L.J. 558 (1967); Note, 44 Tex. L.R. 1047 (1966); Note, 41 N.Y.U. L.R. 651 (1966). The trial court below (App. A, at 17a) doubted whether a lockout would be permissible under the Railway Labor Act. We note, however, that *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238 (1963), demonstrates that in at least some circumstances a carrier may protect itself against union tactics by resorting to self help prior to exhausting the procedures of the Railway Labor Act.

Co., 112 N.L.R.B. 167, 169 (1955). Respondent has made neither a timely nor an unequivocal withdrawal from multi-employer bargaining. It participated in national handling of the same dispute as it arose under the 1959-1960 Section 6 notices, did not notify the carriers that it was withdrawing from national handling when it served its 1965 notices (J.A. 339-340), and has since participated in national handling of other issues.

3. The relevant prior decisions under the Railway Labor Act also support petitioners. In holding that the Act was intended to apply to a railroad owned by a State, this Court noted that collective bargaining in the railroad industry "has often taken on a national flavor," and concluded that the "Congress, aware of these characteristics of labor relations in the interconnected system which comprises our national railroad industry, intended that collective bargaining, as fostered and protected by the Railway Labor Act, should apply to all railroads. Congress no doubt concluded that a uniform method of dealing with the labor problems of the railroad industry would tend to eliminate inequities, and would promote a desirable mobility within the railroad labor force." *California* v. *Taylor*, 353 U.S. 553, 567 (1957).

In *Kennedy* v. *Long Island Railroad Company*, 211 F. Supp. 478 (S.D.N.Y., 1962), aff'd, 319 F.2d 366 (2d Cir., 1963), the Brotherhood of Railroad Trainmen contended that a strike insurance agreement entered into by many railroads violated the Act because, among other things, "it introduced an element of multiparty bargaining without the consent" of the Brotherhood (211 F. Supp., at 488). Chief Judge Ryan rejected that contention on the alternative grounds that the agreement did not constitute multiparty bargaining and that, if it did, "[m]ulticarrier bargaining of labor demands, referred to as regional and

national handling, has been and is (since the Act) the customary method of collective bargaining" (211 F. Supp., at 488). This aspect of his decision was affirmed by the Second Circuit upon the basis of the opinion below (319 F.2d, at 372, fn. 7).

We have referred (pp. 25-26, *supra*) to the argument on behalf of 17 unions before Emergency Board No. 98 that national handling of their union-shop proposals, all of which were substantially identical and served at about the same time, could and should be required. The emergency board agreed, stating, among other things, that:

> "Both parties . . . have repeatedly and consistently recognized national handling as an essential procedure for disposing of national movements on a great diversity of issues covering not merely wages but a wide variety of rule changes including vacations, hours, starting times, craft lines, the 40-hour week, loss of job on railroad consolidations, and, in 1943, a union-shop proposal. In the face of such a firmly established and recognized pattern of collective bargaining on a national scale a finding that a demand for such a procedure in this case was improper could not be made."

Report of Emergency Board No. 98, at 57 (1952).

No prior decision of which we are aware has held or even intimated that national handling may not be required under the Railway Labor Act, where similar proposals are served at or about the same time by or upon a number of railroads.

4. The court below recognized that "good faith bargaining" may include an obligation to bargain on a multiemployer basis, and stated that whether multiemployer bargaining "is . . . obligatory will depend on an issue-

by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements." This appears to mean that the courts are to determine whether or not multi-employer bargaining is "appropriate" as to any particular proposed change in rates of pay, rules or working conditions upon the basis of their views as to whether multi-employer bargaining is "practical" in the light of past experience in bargaining upon the subject of the proposed change. If the courts deem multi-employer bargaining to be "appropriate," then it is "obligatory" with respect to that subject. But if the courts deem multi-employer bargaining to be "inappropriate," then it cannot be required as to that subject even though the identical proposal is made by or to numerous carriers at about the same time, so that a common dispute exists between those carriers and the union.

We agree, of course, with the proposition that the duty "to exert every reasonable effort to make and maintain agreements"—to bargain in good faith—may include an obligation to bargain on a multi-employer basis. The existence of such an obligation may validly turn upon a judgment as to the appropriateness of multi-employer bargaining with respect to the subject matter of a particular Section 6 notice, in the light of past bargaining experience and other relevant circumstances, when the notice is served by or upon a single carrier. We submit, however, that multi-employer bargaining is "appropriate" and "obligatory" in order to comply with the duty to exert *every* reasonable effort to make and maintain agreements, whatever the subject matter of the Section 6 notice may be, when that notice is served at about the same time by or upon a multiple number of carriers and the dispute is not settled in the initial conferences upon the individual properties. As the trial court found (App. A, at 12a) upon

the basis of an extensive record developed in a lengthy trial, "[w]henever a series of identical notices is served on a number of carriers, at about the same time, the subject matter is peculiarly fitting for what is called in the industry 'national handling'. . . ." This is demonstrated not only by the consistent practice of many years, but also by the fact that the making of uniform proposals with respect to a multiple number of carriers is sufficient in itself to establish that a common problem is involved.

But even if the fact that the same Section 6 notices are served by or upon a multiple number of carriers at about the same time is not sufficient in itself to establish the appropriateness of and need for multi-employer bargaining, we think it plain that the court below erred in its "evaluation of the practical appropriateness of mass bargaining on [crew-consist proposals] and of the historical experience in handling any similar national movements."

In reaching its evaluation that multi-employer bargaining is not appropriate with respect to the crew-consist proposals involved here, the court below stated (App. B, at 25a) "that although the BRT and the carriers have occasionally discussed crew consist problems on a national scale, there has never been a national crew consist rule." When one looks at the facts brought out at the trial, however, a considerably different picture is presented. Those facts disclose that the consistent past practice of engaging in national handling, whenever substantially identical proposals are served at about the same time by or upon a multiple number of carriers, has included national handling of crew-consist proposals on several occasions. The disputes created by such proposals, when served in 1941, 1944, 1945, 1947 and 1956, were successfully disposed of by voluntary agreements in national handling. To be sure, they were settled by agreement to withdraw the proposals, but national handling did succeed in settling the matter

peacefully—something that the conferences on the local properties failed to do then and in the current dispute. See p. 9, *supra*. Furthermore, crew consist proposals were again handled nationally in connection with the 1959-1960 Section 6 notices which eventuated in Award 282—the equivalent of a national agreement establishing national procedures and guidelines for determining crew consists. See pp. 4-7, 23, *supra*.

The court below appears to have primarily relied, however, upon the fact that the Presidential Railroad Commission and the Neutral Members of Board 282 deemed a "national prescription of crew size" to be "wholly unrealistic" (App. B, at 25a). But the court below was, if anything, even more mistaken in its evaluation of that fact. The comment thus relied upon was directed by the Neutral Members to the uniform national crew consist rule proposed by respondent—the proposal for a conductor and two brakemen or helpers on all crews which respondent again made in its 1965 Section 6 notices—in the course of demonstrating the unsatisfactory nature of that proposal. Neither the Commission nor the Neutral Members of Board 282 either stated or implied that a national crew-consist *agreement* is "wholly unrealistic." Rather, the Commission recommended such an agreement and Board 282 provided the equivalent of one in its Award. While the Commission and Board rejected the carriers' original proposal—to grant management discretion to determine crew sizes—for other reasons, they did not deem such a national rule to be "unrealistic" or impractical, and they recognized that the proposed rule would permit any adjustments in crew size that the circumstances attending the operation of the crew might necessitate. See pp. 5-6, *supra*. This Court should not ignore the fact, as the court below seems to have done, that the carriers' demand for multi-employer bargaining related to their proposal as

well as to respondent's proposal—both of which were part of the same negotiations. Moreover, the carriers offered to modify their proposal so as to adopt the same approach to a national agreement as was recommended by the Presidential Railroad Commission and as was approved by Board 282—the establishment of national procedures and guidelines for making changes in crew consist.

The reliance by the court below upon the condemnation by "objective boards officially deputized to study the underlying problems and formulate appropriate dispositions" (App. B, at 25a) of the very crew-consist rule which respondent is now seeking to impose on all the carriers through whipsaw tactics, and that court's disregard of the fact that the carriers are seeking to reach through national handling the "appropriate dispositions" which those objective boards in fact recommended or approved, demonstrates conclusively, we believe, that the decision below also is "wholly unrealistic."

Conclusion

For the reasons stated above, certiorari should be granted to review the decision of the Court of Appeals.

Respectfully submitted,

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